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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 585

ROYAL INDEMNITY COMPANY, PARKES D. WENDELL, CHARLES T. TRIGG, et al.,

Petitioners,

vs.

AMERICAN BOND & MORTGAGE COMPANY.

No. 586

ROYAL INDEMNITY COMPANY, PARKES D. WENDELL, CHARLES T. TRIGG, et al.,

Petitioners,

vs.

AMERICAN BOND & MORTGAGE COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO ANSWER ON MOTION FOR INJUNCTION.

SELDEN BACON,
SAUL S. MYERS,
Attorneys and Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1932

Nos. 585 and 586

ROYAL INDEMNITY COMPANY, PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DE FRIEZ, BERTHA VERBY, FRANCES C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN and NEWELL BECKER,

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against

AMERICAN BOND & MORTGAGE COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ON PETITION FOR INJUNCTION.

REPLY TO ANSWER ON MOTION FOR INJUNCTION.

The prime question presented on this appeal is whether the adjudication on the voluntary petition in bankruptcy filed in Chicago on September 5th, 1931 is valid. If it is not, all the proceedings in Chicago have, as we contend, been improper at least from May 25th, 1931, when the bankruptcy petition was filed in Maine, if not from the beginning at 5 p. m. on May 21st, 1931, when the bill in equity

and the collusive petition in involuntary bankruptcy were filed together in the Northern District of Illinois.

The respondents contend that the involuntary proceeding in Chicago has not been prosecuted for the 22 months since its filing because all proceedings therein were stayed on the application of these petitioners. **Such is not the fact.** The stay granted was predicated on General Order in Bankruptcy No. 6 of this Court, by which determination of the question of bankruptcy should first be had, in the domiciliary jurisdiction (Maine). It was granted on September 5th, 1931, and by its terms, as well as on the basis of the application under that General Order, it ran

> "proceedings on said petition to be stayed until the "hearing on the petition in bankruptcy filed against "the respondent herein in the District Court for the "District of Maine or until the further order of the "court" (Record, p. 17).

The adjudication in Maine was entered on October 15th, 1931; so that out of 22 months the stay lasted just 40 days. The rest of the delay of 22 months, three months and a half before the stay and eighteen months since it expired, has been entirely voluntary; and even today it is no party to that proceeding that seeks to revive it, but the equity receivers to whom it was admittedly intended to give "cooperation".

It was not the filing of the petition to vacate the voluntary adjudication that prevented the sending out of notices of a first meeting under that voluntary adjudication in Chicago. That adjudication was entered on September 5th, 1931, and the matter referred to the Referee the same day (Record, pp. 3, 4). It was not until the 11th day of November, 1931 that the Royal Indemnity Co. was even given leave to file its petition to vacate (Record, p. 7) and even then twenty days was given to all other parties to answer it (ibid). No stay of proceedings was sought or granted. Nothing prevented the calling of the first meeting of creditors under that adjudication within the statutory 30 days

ending October 5th, 1931 (Bankruptcy Act, Sec. 55) unless it was a combination of a conviction that the proceeding would ultimately be held to be void, and the desire to keep on administering in the equity receivership, just as they had been doing, despite the unquestionable validity of that bankruptcy proceeding in Maine.

If we are right in our contentions on this appeal it is the bankrupt and the equity receivers who have been combining all this time to prevent the orderly administration of the estate of this bankrupt in the unquestionably valid bankruptcy proceeding in Maine, and not these petitioners who have pressed steadily for a proper administration of the estate.

That the making of an order, on the petition of these equity receivers, appointing a Receiver in the original collusive bankruptcy proceeding of May 21, 1931, in Chicago, which "died a-bornin", will further complicate the matter and tend to render the relief asked by this appeal ineffective is obvious, and doubtless is the real purpose of it. This case is apt to be heard in this court on Monday next, March 20th, 1933. There is nothing to show that brief delay over the proposed reorganization of the President Monroe Corporation will prejudice any one.

Moreover, this extraordinary situation is presented: If the Chicago voluntary adjudication is valid, the property should be administered by a trustee or Receiver under that adjudication. If it is void it must be administered under the Maine adjudication. In neither event is there any jurisdiction to proceed in the defunct collusive Chicago bankruptcy proceeding of May 21, 1931. It has no jurisdiction to appoint in Illinois an ancillary receiver of property which is situate, in law, either at the domicile of the bankrupt, Maine, or at the domicile of the President Monroe corporation, New York. And if any *equity* Receiver were in a position to make such an application it would seem to be the *ancillary equity* Receiver of the bankrupt appointed on May 27, 1931, by the District Court for the Southern District of New York (Motion papers of Equity Receivers

in Chicago, p. 14 of Petition for Injunction, par. 2), who has made no such application.

We believe ourselves entirely justified in the belief that the sole purpose of the application by the Equity Receivers in the Chicago court for the appointment of a Receiver in bankruptcy in the defunct involuntary bankruptcy proceeding there, is to evade the effect of a reversal by this court of the decree appealed from.

The opinion of Judge Peters from which the respondents quote is actually under direct review in the First Circuit Court of Appeals, the appeal having been argued on January 3rd, 1933, and the principal rulings of Judge Peters are on the principal points before this court on the pending appeal here. His opinion under the circumstances will hardly be regarded as controlling here. But the fact that the respondents cite that opinion in opposition to our present motion, and as having direct bearing thereon, certainly makes plain that the pending application in Chicago, which we seek to stay, does interfere with the matters pending before this court on our present appeal, and affect them.

SELDEN BACON
SAUL S. MYERS
Attorneys and Counsel
for Petitioners.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAUL S. MYERS, being duly sworn on oath deposes and says that he is the duly authorized agent and attorney in this behalf of the petitioners herein, that he has, on behalf of the said petitioners, executed the foregoing reply; that he knows the contents thereof and that the same are true. Deponent further says that he is a member of the Supreme Court of the United States and that the reason that this verification is not made by the petitioners is that deponent has been acting as the attorney in this matter for the said petitioners since May 23, 1931 and is personally familiar with all of the facts herein set forth.

SAUL S. MYERS.

Sworn to before me this)
15th day of March, 1933.)
ROSE M. SILICH
Notary Public
N. Y. County Clk's. No. 238
N. Y. Register's No. 4S967
Commission expires March 30, 1934

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

SELDEN BACON,
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Counsel for Appellants.

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SUPPLEMENTAL BRIEF FOR APPELLANTS.

In these cases a proof of the respondent's brief was first received by us on Sunday, March 19th, 1933, and the brief itself only on March 20th, 1933. After the argument on March 21st, 1933 counsel for respondent handed up a brief note of authorities.

We desire to submit this brief reply memorandum.

1. On the argument counsel for respondent was asked the amount of liabilities and the comparative assets but was unable to give them. The court will find a statement of the liabilities and an analysis of the assets at pages 143-155 and 208-212 of the record. It will be noticed that even the claim of sufficient assets to meet liabilities asserted in the equity bill, later admitted and adjudged to be incorrect, was predicated on putting a "substantial" value on the "good-will" of the bankrupt (p. 39, par. Fourteenth).

2. It was admitted by the amended answer to the present application that all the doing of business in Illinois, after the appointment of the equity receivers, was by them and that the Receivers had entire possession of the offices and business (p. 239; par. 22). It was a question of *law* therefore, on these admitted facts, whether the corporation any longer had *its* principal place of business in Chicago after the Receivers took possession.

Hartigan v. *Casualty Co.*, 227 N. Y. 175.

3. The original report of the corporation to the State of Illinois filed in 1931 stated that the Corporation did no business in Illinois in 1930 (p. 55, Answers 13, 15 and 18). There is no suggestion that there was any variation in *this* respect in the supplemental report (See par. 28, p. 226). Attention is also called to the allegation in paragraph 31 of the respondent's answer, that respondent "states the fact to be that during the year 1930, your respondent actually transacted business in its own name" (p. 226).

The conjunctive allegation on the same page (par. 29) that it was actively engaged in business in Illinois "during the years 1930 and 1931" must needs be read with the allegation just quoted from paragraph 31. It does *not* say "throughout" 1930 and 1931.

4. We are unable to see that the decisions in *Banco Comercial* v. *Benn*, 31 F. (2nd) 921, 923, and *In re Schulte United*, 59 F. (2nd) 553, 559, have anything to do with the case at bar.

An application by the petitioning creditors in the Maine proceeding, who were entitled to notice but were given none, to vacate the Chicago adjudication, affecting their rights, on the ground of lack of jurisdiction, was not addressed to the mere discretion of the court. And if it had been, it was an abuse of discretion to refuse to vacate the decree of voluntary adjudication, if the Court was without jurisdiction to render it.

5. The District Judge in *Roszell* v. *Continental Coal Co.*, 235 Fed. 346, was quite in error in thinking that the question whether the bankrupt was domiciled or had its principal place of business in the District for the required period went only to the *jurisdiction of the person*, and not to the jurisdiction of the subject matter. Clearly a New York corporation which had never done business or had a place of business or any property outside that State, could not confer jurisdiction on the bankruptcy court in the District of New Mexico by voluntarily entering its appearance there. Jurisdiction of the subject-matter in bankruptcy is confined to cases within the specifications of the Act. The New Mexico District Court would have *no jurisdiction of the subject-matter* of a petition against such a New York corporation, or a voluntary one by it.

6. Petitions in bankruptcy are always possible at the domicile of a corporation coming within the terms of the Act. The jurisdiction in cases where the corporation has had "its principal place of business" for the required period next preceding the filing of the petition, in a par-

ticular District, is only an added privilege of going to such District where the jurisdictional facts exist.

7. The order refusing to vacate does not pretend to be a default order, but one expressly based on overruling the contentions of law advanced by the petitioners to vacate (pp. 265-266).

Respectfully submitted,

SELDEN BACON,
SAUL S. MYERS,
Counsel for Appellants.